

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR IVAN ZAVALA,

Defendant and Appellant.

F055345

(Super. Ct. No. BF117628A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Leanne Lemon, Deputy Attorneys General, for Plaintiff and Respondent.

Stephanie Gutierrez and Luis Ramirez were shot to death on the evening of January 13, 2007. Defendant Edgar Ivan Zavala was tried for the first degree murder of the victims. The primary witness against defendant was his accomplice, Armando Ayala. Ayala testified defendant was the shooter and Ayala did not know defendant was going to shoot anyone. The jury convicted defendant of the second degree murder of Stephanie Gutierrez. The jury found it was not true that he personally discharged a firearm, resulting in great bodily injury or death. The jury was unable to reach a verdict on the second count of murder with Luis Ramirez as the victim, and a mistrial was declared.<sup>1</sup> Defendant was sentenced to prison for a term of 15 years to life.

He appeals, arguing the evidence is insufficient to support his conviction based on a theory of aiding and abetting. In a related argument he claims the trial court erred in its response to a jury question regarding the liability of a shooter versus an aider and abettor. We affirm.

## **FACTS**

### **a. Testimony of Accomplice Ayala**

Armando Ayala lived in McFarland with his grandmother, Gumercinda Sixtos. Ayala became friends with defendant two or three weeks before the killings. On January 13, 2007, defendant and Ayala were together. They spent some time that evening drinking at the home of Raudel Medrano. Medrano and defendant had been friends for several years.

Defendant and Ayala left Medrano's house around 10 p.m. and went for a walk. While on their walk they stopped and had a conversation with victim Gutierrez, her friend Vanessa Trejo, and an unidentified male. The conversation took place outside the

---

<sup>1</sup> Defendant was retried for the murder of Ramirez and was convicted of first degree murder. In the companion case of *People v. Zavala* (F056331) we affirm defendant's conviction for the first degree murder of Ramirez.

home of victim Luis Ramirez. One of the women asked defendant and Ayala to help them move some items out of her car. The conversation became heated when Trejo wanted a pipe and defendant and Ayala did not have one. Trejo then recognized Ayala as Sixtos's grandson. Sixtos's and Trejo's families were involved in a rent dispute. Defendant joined in the argument. Gutierrez and Trejo were calling defendant and Ayala names. At one point defendant slapped Trejo and told her to shut up. She tried to hit defendant with a bottle of alcohol. Defendant and Trejo continued to scream at each other. Defendant and Ayala eventually walked away; Trejo continued to yell as they walked away.

Defendant and Ayala walked to Ayala's home. Defendant was angry. Ayala went into the bathroom. Defendant retrieved a shotgun from Ayala's closet. Defendant knew where Ayala kept the shotgun.

The two left Ayala's house with defendant carrying the gun in his pants and under his shirt. They walked to Medrano's home looking for shotgun shells. Next, they went to "D's" house and got five shotgun shells there.

Defendant and Ayala then went to Ramirez's house. Defendant knocked on the front door. Ayala stood around the corner of the house. He heard a male voice and then heard defendant ask for "Stephanie" (Gutierrez). Ayala heard a struggle and then a bang; he saw defendant holding the gun. Ayala heard another blast, then a third, and then he heard a female crying out in pain.

Defendant ran around the corner to the alley. He was holding the shotgun and two bags. Ayala and defendant ran to Medrano's house. Defendant fired the gun once in the alley. Outside of Medrano's house, defendant and Ayala came upon Trejo and her boyfriend. Trejo yelled at them and defendant pointed the gun at Trejo's boyfriend. Trejo grabbed the gun and a struggle ensued. Ayala ran to Medrano's house seeking his

help. Medrano came out of the house and took the gun away from defendant and Trejo. Medrano kept the gun and told Ayala and defendant to leave.

Ayala and defendant went to defendant's house. Defendant changed from his checked Pendleton-type shirt and pants. The next morning Ayala went home. Ayala was arrested at 2 p.m. on January 14, 2007.

After his arrest, Ayala was questioned by detectives. He did not immediately tell detectives what happened because he did not want to be a snitch. After talking to his father, Ayala told detectives what happened. Ayala was allowed to plead guilty to assault with a firearm and being an accessory after the fact in exchange for his truthful testimony at defendant's trial.

#### **b. Testimony of Other Percipient Witnesses**

Other witnesses confirmed the activities of defendant on the night of January 13, 2007. Medrano testified that defendant and Ayala were at his house from approximately 3 p.m. to 8 p.m. on January 13, 2007.

Alfredo Carmona had contact with Trejo during critical portions of the evening of January 13, 2007. Trejo was Carmona's girlfriend's cousin. Carmona and his girlfriend picked up Trejo at the market and dropped her off near the home of victim Ramirez. Carmona's vehicle was equipped with a muffler that made a loud sound when it was driven. Carmona left and was getting gas when Trejo called and asked Carmona to return and pick her up at the same location where they had dropped her off. Carmona returned and picked her up in the alley at sometime between 9:30 and 10 p.m. Trejo was with an unidentified male and she was upset.

As Carmona drove away, he saw defendant walking with another male. Carmona continued driving on his way to taking Trejo home when he saw defendant running. Carmona dropped Trejo and the male off in the alley. Carmona left. Carmona did not see Trejo with any guns during the evening.

Trejo testified at trial. Trejo has known Gutierrez 10 years and was with her the evening of January 13, 2007. They left the home of Gutierrez's parents and got a ride to Ramirez's house. Trejo argued with defendant and another male outside of Ramirez's house. Gutierrez went inside during the argument. Trejo and the other man argued, and then defendant joined in. Defendant called Trejo a bitch. She slapped him, and he slapped her back. Defendant told Trejo he was going to kill her. Trejo replied that "we will see who kills who." Trejo went into Ramirez's house. Trejo left Ramirez's house and went to the market. Carmona then picked her up, they went cruising, and then Carmona dropped her off at a location near, but not at, Ramirez's house.

Trejo and her boyfriend walked toward Ramirez's house. Trejo saw defendant and remarked to him that she thought he said he was going to kill her. Defendant took the gun out and pointed it at Trejo. Trejo grabbed the gun and struggled with defendant over the gun. Medrano came and took the gun away. Trejo and her boyfriend left and walked toward Ramirez's house when they saw a lot of law enforcement activity. Trejo was stopped by law enforcement and taken in for questioning.

Medrano testified that Ayala knocked on his door and told him there were people in the alley struggling over a gun. Medrano took the gun away and told Ayala and defendant to leave. Medrano did not know the gun had been used to kill the victims. He took the gun inside his house, where it accidentally discharged on his bed. He then put the gun outside of his house.<sup>2</sup>

One of Ramirez's neighbors heard three gunshots on the evening of January 13, 2007. Another neighbor saw a male and a female near Ramirez's house on the evening of January 13, 2007. He decided to lock the gates in the area. While locking the gates, he heard a truck with a "deep" sounding exhaust leave the alley. Within five to ten

---

<sup>2</sup> Medrano was not charged with any crimes for his involvement with the gun.

minutes after the truck left the alley, the neighbor returned to his house. When he got to his door he heard gunshots.

Ayala's grandmother testified that her deceased husband had a shotgun. The last time she saw it was in December of 2006, the same time that Ayala came to live with her. She had never seen the gun in Ayala's closet and she would have seen it because she went to his closet every day.

### **c. Investigation**

Law enforcement arrived at Ramirez's home at approximately 11 p.m. The front door was open and a female in the house was screaming that she had been shot. Ramirez was dead on the floor just past the front door. Medical personnel arrived to aid the female, Gutierrez. As she was being taken out of the house on a gurney she was asked by a deputy sheriff who shot her. She said Trejo shot her. Shotgun casings were found in the house.

Gutierrez died from a gunshot wound to her stomach. Ramirez died from a gunshot wound to his head. There was stippling on both victims, indicating that the gun was fired from a distance of one to four feet away. The gunshot to Ramirez's head would have caused blood spatter in the area.

The next day defendant and Medrano were arrested at Medrano's house. A shotgun was found on the roof of Medrano's house. The shotgun was found to be the murder weapon because the casings found at the scene of the murder were determined to have been fired by the shotgun.

Defendant's home was searched. In his closet they found a shirt, identified by several witnesses as the shirt defendant was wearing the evening of the killings, as well as a pair of pants. The clothing was seized and analyzed. What was thought to be a bloodstain was found on the shirt. The sample contained a major contributor and some

minor contributors. It was determined that the major contributor to the bloodstain was victim Ramirez. The minor contributor was consistent with defendant.

#### **d. Defense**

Ayala testified that he fired the shotgun on New Year's Eve 2006. He said defendant was not there when he fired it, but Ayala saw defendant that night and defendant knew Ayala had the gun.

Bernadine Garcia testified that defendant was at her house on New Year's Eve, 2006, arriving at 9 p.m. and leaving at 1 or 2 a.m.

Ayala's grandmother testified she did not hear any gunshots on New Year's Eve.

### **DISCUSSION**

#### **I. Substantial Evidence**

Defendant was found guilty of the second degree murder of Gutierrez. The jury found not true the allegation that defendant personally discharged a firearm. Defendant contends the jury's verdict demonstrates it did not find him guilty as the shooter, thus his liability was based on a theory of aiding and abetting. Defendant argues the evidence is not sufficient to support his second degree murder conviction as an aider and abettor.

Defendant asserts the only evidence offered at trial upon which his conviction could have been based was that he was the shooter. This testimony came solely from Ayala. The argument continues that the verdict shows the jury believed Ayala was the shooter and there was no evidence defendant assisted Ayala in the shooting. Factually, defendant contends the only circumstantial evidence linking him to the shooting was the drop of Ramirez's blood on his shirt and that he and Ayala were seen running from the location of the homicide. As part of this argument defendant asserts the drop of Ramirez's blood in no way connects him to the murder of Gutierrez and is not evidence he was present when Gutierrez was shot. In addition, defendant contends the jury

obviously did not believe Ayala and thus defendant disregards the entirety of Ayala's testimony in his substantial evidence analysis.

In making a determination of whether substantial evidence supports a conviction "we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. [Citation.] We simply consider whether ""any rational trier of fact could have found the essential elements of [the charged offenses] beyond a reasonable doubt."" [Citations.]' [Citation.] Unless it is clearly shown that 'on no hypothesis whatever is there sufficient substantial evidence to support the verdict' the conviction will not be reversed. [Citation.]" (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162, brackets in original.)

Although respondent claims defendant is wrong in his premise that the jury verdict requires the evidence of his conviction be reviewed based only on a theory of aiding and abetting, we need not determine this question because we find the evidence is sufficient to support the conviction under a theory of aiding and abetting.

"An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense." (*People v. Avila* (2006) 38 Cal.4th 491, 564.) "[M]ere 'presence at the scene of a crime or failure to prevent its commission [is not] sufficient to establish aiding and abetting.'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1024, brackets in original.)

Defendant relies on *People v. Rutkowsky* (1975) 53 Cal.App.3d 1069 to support his position. In *Rutkowsky*, the defendant's murder conviction was clearly supported by substantial evidence and he did not raise a substantial evidence argument on appeal. Rutkowsky and the victim engaged in an argument and physical confrontation. They separated, and several hours later they confronted each other again. The defendant shot the victim in the face with a shotgun. On appeal, the defendant did challenge whether the



court should have instructed the jury to view the testimony of alleged accomplices, Rose and Rodriguez, with distrust. The appellate court found that the trial court did not err in failing to give accomplice testimony because the evidence did not show that either Rose or Rodriguez was an accomplice. Rodriguez was merely a percipient witness. Rose knew of the first argument and knew of “the victim’s return to the home and had asked defendant also to return there.” Rose also knew there was a shotgun in the house. The appellate court found that assistance after the fact was insufficient to show aiding and abetting. (*Id.* at pp. 1071-1073.)

Defendant argues that, as in *Rutkowsky*, the evidence here was only sufficient to show that he may have been an accessory after the fact because he ran away with Ayala and had possession of the weapon.

First, contrary to defendant’s argument, we need not reject the entirety of Ayala’s testimony in determining the sufficiency of the evidence. “The jury is the ultimate judge of credibility. The jury may find a witness is credible in some respects and not in others; it may believe parts of a witness’s testimony without believing all of it.” (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1029; see *People v. Anderson* (2007) 152 Cal.App.4th 919, 940.)

The evidence here was more than sufficient to support defendant’s conviction. He had an argument earlier in the evening outside the home of Ramirez. Although he argued with Trejo, Gutierrez was there with Trejo and was present during at least part of the confrontation. Gutierrez and Trejo were calling defendant and Ayala names. Defendant threatened to kill Trejo. Defendant obtained a shotgun at Ayala’s. Defendant and Ayala returned to the place where the original confrontation took place, and Ramirez and Gutierrez were shot. Defendant was seen running from the scene of the crime and was seen in the possession of the murder weapon after the crime. In addition, defendant had

the blood of Ramirez on his shirt. Gutierrez and Ramirez were shot very close in time, as evidenced by the neighbors hearing the gunshots in short succession.

The jury could have believed that Ayala had much more involvement than he testified to and, based on this disbelief of Ayala's testimony regarding his involvement, it may not have been able to determine who the shooter was beyond a reasonable doubt, and thus found the firearm enhancement to not be true. Yet, the jury still could have found that Ayala and defendant acted together in returning to the scene of the confrontation to kill the individuals in the home where the confrontation took place. The evidence supported this theory. Substantial evidence supports defendant's conviction of second degree murder.

## **II Court's Response to a Question From the Jury**

During deliberations the jury sent out the following note: "If it is thought that there is a possibility that he may not be the shooter but was an accomplice instead, can he be charged with a first or second degree verdict."

The court discussed the question with counsel. It was defense counsel's position that the court should not allow the jury to proceed on a theory defendant was guilty as an accomplice of aiding and abetting the murders. The court determined it was going to answer the jury's question and refer them to accomplice and aiding and abetting instructions. Defendant objected.

The court responded to the jury as follows: "I am responding now to your question.

"The first thing I will tell you is this: A person who aids and abets the commission of the crime of either first degree murder or the crime of second degree murder is equally guilty of the crime of first degree murder or second degree murder.

"Having said that, I am also going to remind the jurors that you need to follow the instructions on the law that I have given to you. And I have given you a number of

instructions which relate to the concept of a person who aids and abets the commission of a crime. It's important that you consider all of those instructions.

"I am just going to read those instruction numbers again, if you want to write these down. 3.00 [principals defined]. 3.01 [aiding and abetting defined]. 3.10 [accomplice defined]. 3.11 [testimony of accomplice or codefendant must be corroborated]. 3.12 [sufficiency of evidence to corroborate an accomplice]. 3.14 [criminal intent necessary to make one an accomplice]. 3.16 [witness accomplice as a matter of law]. 3.18 [testimony of accomplice to be viewed with care and caution].

"So I am encouraging you to specifically look at those instructions as well as all the other instructions I have given to you. But the ones I have identified specifically relate to the question that you have asked me and are important for you to take another look at.

"I am also going to remind the jury that I have instructed you on the concept of accomplice testimony. And I have already referred to 3.18. Actually, I have given you some numbers that refer to accomplice, a witness accomplice and accomplice testimony. So some of those numbers that I gave to you specifically relate to the theory of aiding and abetting, and some of those numbers I have given to you relate to an accomplice.

"So I don't want to confuse you. I have instructed you both as to aiding and abetting. I have instructed you as to accomplice. And so the numbers that I specifically read to you relate to those subjects. But, again, I want you to consider all the instructions. And I am not telling you just look at those and not the others. You should consider all the instructions as you consider the Court's response to your question and as you continue to deliberate on your verdict."

Defendant contends the court's response to the jury was erroneous because an aider and abettor is not "equally guilty" if the aider and abettor's mental state is not the same as the perpetrator's mental state or the crime committed by the perpetrator was not

the natural and probable consequence of the crime the defendant intended to aid and abet. Defendant rehashes the previous argument and states there is no evidence to support a conviction based on aiding and abetting and, in addition, argues that the answer by the court constituted a directed verdict of murder because it withdrew the question of defendant's mental state from the jury. Finally defendant claims the court's answer allowed the jury to find him "equally guilty" if he was merely present at or near the crime scene or was merely an accessory after the fact.

In response to the People's argument that the instructions cured any possibly error, defendant counters that there is no assurance that the jury read any further instructions and the court's statement withdrew from the jury the question of defendant's mental state and constituted a directed verdict.

"By statute, trial courts are required, on request of a deliberating jury, to instruct 'on any point of law arising in the case.' (Pen. Code, § 1138.)" (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1047.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] "In determining whether error has been committed in giving ... jury instructions, we must consider the instructions as a whole ... [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.'" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088, brackets in original.)

We begin by noting defendant does not challenge the content of any of the instructions the court told the jury to read in response to their question. Defendant's only challenge is to the "equally guilty" portion of the trial judge's response.

We do not find the court's response to be erroneous. The jury's question, although not artfully stated, was a query whether defendant could be liable for first degree murder or second degree murder if he was not the shooter. The trial court's answer was that if an accomplice aids and abets a first degree murder or a second degree murder he is liable for that crime as if he were the direct perpetrator. The court's response clearly demanded that the jury must first find that the defendant aided and abetted the crimes before they could find him guilty as an accomplice. The use of the term "equally guilty," when considered in light of the question, was not erroneous. We do not find the court's comment misdirected the jury from the principle that the liability of an aider and abettor may be different from that of the actual perpetrator. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1120.)<sup>3</sup> As the jury was instructed in part in CALJIC No. 3.01, the definition of aiding and abetting requires the jury to find defendant *intended* to commit, encourage or facilitate the crime.

Even if it was erroneous, this one sentence of the court's response cannot be viewed in isolation. The court told the jury it must follow the instructions and then directed it specifically to the instructions applicable to principals, aiding and abetting, and accomplice liability. The court stated that these instructions relate to the question asked by the jury. These instructions correctly list the elements that must be found before aider and abettor liability attaches.

There is no reasonable likelihood that the jury misconstrued or misapplied the law in light of their question to the court, the court's response, the instructions given, and the entire record of the trial. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277.)

---

<sup>3</sup> Aider and abettor liability is premised on the aider and abettor's own mens rea. "If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1120.)

**DISPOSITION**

The judgment is affirmed.

---

VARTABEDIAN, Acting P. J.

WE CONCUR:

---

KANE, J.

---

POOCHIGIAN, J.